UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

In Re: Pet Food Products Liability Litigation	MDL No. 1850 Civil Action No. 07 2867 (NLH) Hearing Date: September 15, 2008

DEFENDANT NUTRO PRODUCTS, INC.'S OPPOSITION TO INTERESTED PARTY'S MOTION FOR DECLARATORY JUDGMENT OR RELIEF FROM STAY; DECLARATION OF GARY L. JUSTICE IN SUPPORT OF OPPOSITION

PRELIMINARY STATEMENT

Robert Josephs, who is not a named party to the above entitled action, but who is a member of its preliminarily approved settlement class, moves this Court for declaratory judgment that the stay of "any action or proceeding in any court or tribunal asserting any of the matters, claims or causes of action" relating to the exact issues that have been mediated and settled in this case does not apply to his state court action against Defendant Nutro Products, Inc. ("Nutro"), which was initiated nearly two months after this Court's approval of the parties' proposed settlement. *See* Order Granting Preliminary Approval of Class Action Settlement, Approval of Proposed Form of Notice, and Preliminary Certification of Settlement Class, MDL Docket No. 1850 (All Cases), Dkt. # 153 (filed May 30, 2008) (the "Order"). Nutro files this statement in opposition (the "Opposition") to Josephs' Motion for Declaratory Judgment or Relief from Stay (the "Motion"). Because Mr. Josephs' state court action falls clearly within and is barred by the stay of subsequent proceedings mandated by the Order, this Court should deny Mr. Josephs' requested relief.[1]

[1] This Court should deny the requested relief for the additional reason that Mr. Josephs has not properly intervened in these MDL proceedings.

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Mr. Josephs was the owner of a two year old cat that passed away in the wake of its alleged consumption of an unidentified Nutro pet food product. Motn. at ¶1; *See* Declaration of Gary L. Justice (“Justice Decl.”) at ¶3 and Exh. B. After Nutro’s insurer denied Mr. Josephs’ claim for reimbursement of recall-related expenses, and after further apparently unsuccessful efforts to recoup payment directly from Nutro, on July 29, 2008, Mr. Josephs filed a small claims action in Waltham District Court, located in Waltham, Massachusetts, entitled *Josephs v. Nutro Products, Inc. and Ron Ong, President*, Civil Action No. 08 SC 0881. *Id*. ¶¶ 2-11. The Waltham District Court set the case for trial on September 15, 2008. *Id*. ¶ 12.

Immediately upon learning of the small claims action, counsel for Nutro, Gary L. Justice of Gibson, Dunn & Crutcher LLP, contacted Mr. Josephs by e-mail in an effort (a) to alert him to the existence and parameters of the preliminarily approved settlement and (b) to resolve the matter informally. Justice Decl. at ¶ 1 and Exh. A; Motn. at ¶¶ 13, 14. In that e-mail, Mr. Justice also explained that this Court’s “preliminary approval order entered in the class action case provides for a stay of actions such as your small claims action, so the September 15 trial date will need to be vacated.” Motn. at ¶ 14 (quoting from G. Justice e-mail, Exh. A to Justice Decl.).

By way of response, Mr. Josephs filed the underlying Motion on grounds that “the Stay established by this Honorable Court . . . does not apply to Josephs’ small claims action since the action is in state court and Josephs is not a Plaintiff in the ‘Pet Food Products Liability Litigation’ now pending.” Accordingly, his Motion asks this Court to declare that the applicable stay does not pertain to his lawsuit, and to enjoin attorneys for Nutro from so asserting, or, in the alternative, to lift the applicable stay with respect to his lawsuit so that he may proceed against Nutro in Massachusetts state court. *Id*. at ¶15, Prayer for Relief at ¶¶ 1-3.

ARGUMENT

I. The Preliminary Approval Order Clearly Applies To and Bars Mr. Josephs' State Court Action.

This Court's preliminary approval Order sets forth a blanket prohibition on the commencement of any proceeding before any tribunal regarding any of the claims to be released upon final approval of the settlement, against any of the defendants. Mr. Josephs lawsuit, filed nearly two months after the entry of the Order, plainly violates this prohibition.

Paragraph 21 of this Court's Order provides as follows, in full:

> Pending Final Approval, ***no Settlement Class Member, either directly, representatively, or in any other capacity, shall file, commence, prosecute or continue against any or all of the Released Parties, any action or proceeding in any court or tribunal*** asserting any of the matters, claims or causes of action that are to be released upon Final Approval pursuant to the Settlement Agreement, and are hereby enjoined from so proceeding. Upon Final Approval, all Settlement Class members ***except those persons found by this Court to have validly excluded themselves from the settlement shall be forever enjoined and barred*** from (i) filing, commencing, prosecuting, continuing, maintaining, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on any or all Released Claims against one or more Released Entities or against any person or entity who may claim over against any Released Entity for contribution or indemnity; (ii) instituting, continuing, maintaining, organizing class members in, or joining with class members in, any action or arbitration, including but not limited to a purported class action, in any jurisdiction, against one or more Released Entities, or against any person or entity who may claim over against any Released Entity for contribution or indemnity, based on, involving, or incorporating, directly or indirectly, any or all Released Claims; and (iii) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding, or order in any jurisdiction based on an allegation that an action taken by any of the Released Entities, which is in compliance with the provisions of the Settlement Agreement, violates any legal right of any Settlement Class Member.

The language of Paragraph 21 is precise and unequivocal: no member of the settlement class may initiate a lawsuit against a defendant to the class action regarding the claims resolved by the litigation and released upon final settlement. Mr. Josephs, to this very day a member of the settlement class, cannot maintain his action against Nutro without contradicting this Court's Order.[2]

II. This Court Should Enjoin the State Court Proceeding Pursuant to the Anti-Injunction Act.

This Court acted well within its authority in staying subsequent proceedings of the same nature as the claims litigated in this class action pursuant to the second and third exceptions to the Anti-Injunction Act, which respectively authorize a federal court to issue an injunction "where necessary in aid of its jurisdiction" or to "protect or effectuate its judgments." 28 U.S.C. §2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or *to protect or effectuate its judgments*" (emphasis added)).

With respect to the second exception to the Anti-Injunction Act, the Third Circuit has expressly noted that "[t]he threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are . . . impending settlements in federal actions." *In re Diet Drugs Prods. Liab. Litig.*, 220 F.3d 220, 236 (3d Cir. 2002). Such threats are particularly acute in the context of complex litigation and unquestionably warrant a stay such as that imposed by this Court. *See id.* at 235 ("[A] federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction").

With respect to the third exception to the Anti-Injunction Act, the Third Circuit has observed that

> Complex cases in the later stages--where, for instance, settlement negotiations are underway--embody an enormous amount of time and expenditure of resources. It

[2] Although the Order provides an exception limited to settlement class members who "have validly excluded themselves" from the settlement, or "opted out." Mr. Josephs did not timely or validly opt out of this class action settlement by the Court-ordered deadline of August 15, 2008. Justice Decl. ¶ 2.

> is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. These cases are especially vulnerable to parallel state actions that may frustrate the district court's efforts to craft a settlement in the multi-district litigation before it, thereby destroying the ability to achieve the benefits of consolidation.

id. at 236; *see generally United States Steel Corp. Plan for Emp. Ins. Bens. v. Musisko, 885 F.2d 1170 (3d Cir. 1989).* To allow Mr. Josephs' state court action to proceed to trial on September 15, 2008, or otherwise would flout the spirit of this exception to the Anti-Injunction Act, would cause detriment to this Court's judgment in this complex class action, and would be no more than a "relitigation of . . . controversies fully adjudicated" previously by this Court.

Simply put, the Anti-Injunction Act fully authorizes this Court's May 30 injunction against Mr. Josephs' state court proceedings.

CONCLUSION

In conclusion, Nutro respectfully requests that this Court decline to grant Mr. Josephs relief from the stay of proceedings as set forth in the preliminary approval Order pursuant to the authority granted by the second and third exceptions to the Anti-Injunction Act.

DATED: September 2, 2008

Gary L. Justice
Lindsay R. Pennington

GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue, 47th Floor
Los Angeles, California 90071
Tel: (213) 229-7000
Fax: (213) 229-7520

By: ______________/s/_____________
Lindsay R. Pennington

Attorneys for Defendant,
NUTRO PRODUCTS, INC.

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